FILED
95-697 OCT 30 1995
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No._____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1995

RONALD E. CROMWELL and
VICTORINE L. CROMWELL,
Petitioners,
v.

SECURITY SERVICES NETWORK, INC.,
STEVEN L. COFFEY and ASSET PLANNING
CORPORATION,
Respondents.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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October 30, 1995

Questions Presented

I. Is the parties' adoption of the NASD Code of Arbitration Procedure a "clear and unmistakable" expression of their intent to have the question of arbitrability decided by the arbitrators and not the courts?

II. Where a claim to enjoin an arbitration is filed in federal district courts and where venue is proper under the federal venue statute only in a judicial district in which a substantial part of the events or omissions giving rise to the "claim" occurred, is the "claim" referred to by the statute the claim for injunctive relief or the claim in the underlying arbitration proceeding?

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Opinions Below

The opinions below are unreported. The Court of Appeals opinion is *Security Services Network, Steven L. Coffey & Asset Planning Corporation v. Ronald E. Cromwell and Victorine L. Cromwell*, No. 94-5778 (Sixth Circuit, August 1, 1995). It is reproduced in the Appendix ("App.") at App. 1 to 9. The district court opinion is *Security Services Network, Steven L. Coffey and Asset Planning Corporation v. Ronald E. Cromwell and Victorine L. Cromwell*, No. 3-93-CV-507 (E.D. Tenn., May 17, 1994). It is reproduced at App. 10 to 14.

Jurisdiction

The judgment of the Court of Appeals was entered on August 1, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1)(1988).

Statutory Provisions Invoked

Issue II involves subsection (a)(2) of the federal venue statute, 28 U.S.C. § 1391, as it pertains to cases in which jurisdiction is founded upon diversity of citizenship. Subsection (b)(2) of the statute may be involved if jurisdiction was also properly founded upon the existence of a federal question, as the district court held it was.

The text of these statutory provisions is as follows:

§ 1391. Venue generally

(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which the defendants are subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.

(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

STATEMENT OF THE CASE

Petitioners, Ronald E. Cromwell and Victorine L. Cromwell (the "Cromwells") began purchasing investments from Steven L. Coffey ("Coffey") in the early 1980s while he was a broker with Asset Planning Corporation ("Asset Planning"). The Cromwells kept their account with Coffey after he left Asset Planning and formed his own company, Security Service Network, Inc. ("SSN").

At all relevant times, Coffey, now deceased, was a resident of Tennessee. App. 16. SSN and Asset Planning are Tennessee corporations with their principal places of business in Tennessee. App. 16. The Cromwells were residents of Tennessee when they met Coffey, App. 9, but they had moved to Arizona by the time this dispute arose. App. 16, 17.

On June 12, 1993, the Cromwells filed an arbitration demand with the National Association of Security Dealers, Inc. ("NASD") pursuant to the NASD Code of Arbitration Procedure ("NASD Code"). App. 3. The arbitration demand was mailed from Arizona, where the Cromwells resided, to NASD offices in New York City. App. 9. The Cromwells' arbitration demand asserted claims based upon Coffey's behavior in recommending the investments. App. 8.

On August 27, 1993, respondents filed this action in the United States District Court for the Eastern District of Tennessee. They sought an injunction staying the arbitration proceeding and a declaratory judgment that the Cromwells' claims were not eligible for arbitration. App.

4, 15. Respondents relied upon Section 15 of the NASD Code which provides:

> No dispute, claim or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim or controversy.

App. 5.

The Cromwells moved to have the case dismissed for improper venue. App. 4. The motion was denied. *Id.* The Cromwells then answered and moved for summary judgment. The district court denied the Cromwells' motion and granted the cross-motions of the respondents. Relying upon *Dean Witter Reynolds, Inc. v. McCoy*, 995 F.2d 649 (6th Cir. 1993), the district court held that the arbitrability of claims was an issue properly to be decided by a court and, having crossed that bridge, the district court went on to hold that the Cromwells' claims were, with one exception, *not* eligible for arbitration because they were time-barred by Section 15 of the NASD Code. App. 13.

The Cromwells filed a timely appeal. After briefs had been filed, and less than two weeks before oral argument, this Court's decision was announced in *First Options of Chicago, Inc. v. Kaplan*, 115 S.Ct. 1920 (1995). That decision drew into question the continued authority of *Dean Witter Reynolds, Inc.*, which had reached the conclusion, without engaging in a case-specific analysis of what the parties intended as required by this Court's precedents, that arbitrability was an issue for the courts to decide.

Rather than apply the *Dean Witter Reynolds, Inc.* precedent (or overrule it as urged by the Cromwells), the Sixth Circuit engaged in the analysis of the parties' intent required by this Court's opinion in *First Options of Chicago, Inc.* The Court looked specifically at Section 35 of the NASD Code, which had been interpreted by the Eighth Circuit in *FSC Securities Corp. v. Freel*, 14 F.3d 1310 (8th Cir. 1994), to be clear and unmistakable evidence of the parties' intent that arbitrators decide the issue of arbitrability. Section 35 of the NASD Code provides as follows:

> The arbitrators shall be empowered to interpret and determine the applicability of all provisions under this Code which interpretation shall be final and binding upon the parties.

Rejecting the Eighth Circuit's interpretation of the very same language, and following instead the Seventh Circuit's decision in *Edward D. Jones & Co. v. Sorrells*, 957 F.2d 509 (7th Cir. 1992), the Court concluded that the parties' adoption of this provision did *not* constitute "clear and unmistakable evidence" that the parties had agreed to arbitrate the issue of arbitrability. App. 6.

Having decided again that the issue of arbitrability was for the courts to decide and not the arbitrators, the Court of Appeals reviewed and affirmed on the merits the district court's decision that the Cromwells' claims were not arbitrable. The Court of Appeals also affirmed the district court's determination that venue was proper in the eastern district of Tennessee.

Reasons for Granting the Writ

This petition for writ of certiorari should be granted under Supreme Court Rule 10.1(a). The courts of appeal have reached conflicting decisions on an issue of substantial importance to investors and brokerage firms across the country: Does the NASD Code embody clear and unmistakable evidence of an agreement by those who have subscribed to it that the issue of arbitrability is to be decided by the arbitrators? The Eighth Circuit says it does. The Seventh Circuit, the Eleventh Circuit, and now the Sixth Circuit say it does not.

In *FSC Securities Corp v. Freel*, 14 F.3d 1310, 1312 (8th Cir. 1994), the Eighth Circuit unequivocally held that Section 35 of the NASD Code reflects a clear and unmistakable agreement by the parties to submit the issue of arbitrability to the arbitrators. The Court held, in part:

> [T]he parties expressly agreed to have their dispute governed by the NASD Code of Arbitration Procedure. This means they adopted the entire NASD Code, including Section 35. Unlike the Seventh Circuit, we hold that the parties' adoption of this provision *is* a "clear and unmistakable" expression of their intent to leave the question of arbitrability to the arbitrators. In no uncertain terms, section 35 commits interpretation of all provisions of the NASD Code to the arbitrators. Reading the NASD Code--effectively an agreement between the parties--as a whole, we see no reason not to apply section 35 to the

> arbitrators' decision regarding the application of section 15.

14 F.3d at 1312-1313.

The Seventh Circuit reached exactly the opposite conclusion in *Edward D. Jones & Co. v. Sorrells*, 957 F.2d 509 (7th Cir. 1992). Addressing the very same Section 35 of the NASD Code, that court said it did *not* "believe this is a clear and unmistakable expression of the parties' intent to have arbitrators, and not the court, determine which disputes the parties have agreed to submit to arbitration". 957 F. 2d at 514, n. 6.

In this case, the Sixth Circuit had to choose between the opposing conclusions of the Seventh and Eighth Circuits. App. 6. It chose to follow the Seventh Circuit. So, too, has the Eleventh Circuit. *Merrill Lynch, Pierce Fenner & Smith, Inc. v. Cohen*, 62 F.3d 381 (11th Cir. 1995).

The question of whether the NASD Code "clearly and unmistakably" commits the issue of arbitrability to the arbitrators is one that potentially affects thousands of investors. It has been adequately ventilated in the courts of appeal, which have reached differing conclusions. The current state of affairs is an open invitation to forum shopping that is only made worse by uncertainty over where venue is proper in actions brought to stay arbitration. Petitioners urge the Court to exercise its discretion, to resolve the conflict among the courts of appeal, and to impose consistency upon the manner in which federal courts construe a Code that is intended to apply uniformly to brokerage contracts across the land.

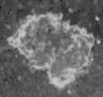
Conclusion

For these reasons, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX



APPENDIX

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

No. 94-5778

SECURITIES SERVICE NETWORK, INC.,
STEVEN L. COFFEY, and
ASSET PLANNING CORPORATION,
Plaintiffs-Appellees,

v.

RONALD E. CROMWELL and
VICTORINE L. CROMWELL,
Defendants-Appellants.

Argued June 8, 1995

Decided August 1, 1995

Before MARTIN, Circuit Judge, and SILER, Circuit Judge, and JOINER, District Judge for the Eastern District of Michigan, sitting by designation.

OPINION

PER CURIAM. Ronald E. Cromwell and Victorine L. Cromwell appeal the district court's grant of summary judgment in favor of Securities Service Network, Inc., and its president Steven L. Coffey. They claim that the district court erred in ruling that their demand for arbitration was time-barred and in denying their motion to dismiss for improper venue. For the following reasons, we affirm the judgment of the district court.

I

The Cromwells first met Coffey in 1981. At the time, Coffey was a registered securities representative with Asset Planning Corporation, a NASD-registered corporation that operated as a broker/dealer. In 1983, Coffey left Asset Planning to form the NASD-registered Southern Financial Consultants, Inc., which changed its name to Security Service Network, Inc., in 1989.

Shortly after meeting Coffey, both Ronald and Victorine Cromwell obtained real estate licenses and became real estate brokers. They also became regular investors in various Coffey-related partnerships and limited partnerships: from September 1981 through 1987, the Cromwells made twenty-two investments at Coffey's behest. From late 1981 through February 1983, the Cromwells maintained a brokerage account with Asset Planning Corporation, and Coffey was their account representative. They made eight of their twenty-two investments during that period. In 1983, however, Victorine Cromwell became a licensed and registered securities representative with Southern Financial

Consultants, Inc., and began selling investments. She served as the Cromwells' account representative for the remaining fourteen investments, presumably receiving a commission and conducting a suitability review with respect to each one.

Coffey served as the general partner in four ventures in which the Cromwells invested: the Hardin Mill Partnership, the Cusick Partnership, Kingston-Watt, Ltd., and Kingston-Watt, II, Ltd. They also invested in Bridgewater Associates, Ltd., a partnership of which Coffey served as president. All told, they invested roughly $264,000 in those ventures. In so investing, the Cromwells presumably relied upon Coffey's expertise, his seeming good faith, and his representations regarding the nature, quality, and risk of those investments.

Suspicious of Coffey's advice, the Cromwells began withholding their contributions from the Coffey-managed ventures in 1991. In his capacity as general partner, Coffey responded by threatening legal action in November 1992. In January 1993, the Cromwells relinquished their interests in the Hardin Mill Partnership, the Cusick Partnership, Kingston-Watt, Ltd., and Kingston-Watt, II, Ltd., to Coffey, in exchange for a release from future liability.

II

On June 12, 1993, the Cromwells filed a Statement of Claim and Demand for Arbitration with NASD, naming Coffey, Security Services Network, Inc., and Asset Planning Corporation as respondents. They sought damages for state and federal law violations arising from their purchase of twenty-two "unsuitable and speculative

instruments". They claimed that they could not have detected Coffey's misrepresentations until 1991.

In response, Coffey, Security Services Network, Inc., and Asset Planning Corporation filed this suit, seeking a ruling that their claims were not eligible for arbitration pursuant to Section 15 of NASD's Code of Arbitration Procedure, as they were barred by the six-year statute of limitations. The Cromwells moved to dismiss for lack of subject matter jurisdiction and improper venue.

The district court denied their motion on November 15, ruling that it had subject matter jurisdiction and that venue in the Eastern District of Tennessee was proper. The Cromwells then filed an answer to the complaint as well as a counterclaim, seeking to compel arbitration under the Federal Arbitration Act, 9 U.S.C. § 1 et seq. On December 3, the district court granted Asset Planning Corporation's unopposed motion for summary judgment, later clarifying that its order did not pertain to Coffey or Security Services Network, Inc.

The remaining parties then filed cross motions for summary judgment. In a May 17, 1994, order, the district court partially granted the motion of Coffey and Security Services Network, Inc., enjoining the Cromwells' claims for arbitration regarding each investment, save claims concerning the Cusick Partnership. In so ruling, the court distinguished their Cusick Partnership investment from their other investments on the grounds that it was made within six years of their arbitration demand. This timely appeal followed. Although the Cromwells' notice of appeal only designates an appeal of the May 17, 1994, order granting summary judgment, they also address the

November 15, 1993, order regarding venue in their brief without objection.

III

A. The Timeliness of the Cromwell's Demand for Arbitration

Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986). This Court reviews a district court's grant of summary judgment *de novo. Brooks v. American Broadcasting Cos., Inc.*, 932 F.2d 495, 500 (6th Cir. 1991). Moreover, in reviewing a summary judgment motion, we view the evidence in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Boyd v. Ford Motor Co.*, 948 F.2d 283, 285 (6th Cir. 1991), *cert. denied*, 112 S.Ct. 1481 (1992).

Section 15 of the NASD Code of Arbitration Procedure provides: "No dispute, claim, or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim, or controversy." After the parties filed their respective briefs in this case, *First Options of Chicago, Inc., v. Kaplan*, 115 S. Ct. 1920 (1995), was decided, instructing courts how to resolve a disagreement between parties to an arbitration agreement, concerning the arbitrability of an underlying dispute. Specifically, the Supreme Court outlined "how a court should decide whether the parties have agreed to submit the arbitrability issue to

arbitration," *Id.* at 1924, advising courts to apply state law contract principles. *Id.* (citations omitted). Importantly, however, the Court also cautioned that "[c]ourts should not assume that the parties agreed to arbitrate the issue of arbitrability unless there is 'clear and unmistakable evidence' that they did so." *Id.* (quoting *AT & T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 649 (1986).

On the record before us, the Cromwells cannot show that Coffey and Security Services Network, Inc., clearly and unmistakably agreed to submit the question of arbitrability to arbitration. As the Cromwells emphasized at oral argument, Section 35 of the NASD Code of Arbitration Procedure states that "[t]he arbitrators shall be empowered to interpret and determine the applicability of all provisions under this Code which interpretation shall be final and binding upon the parties." However, we do not believe that this provision alone constitutes the requisite "clear and unmistakable evidence" that the parties intended and agreed to arbitrate the issue of arbitrability. *Edward D. Jones & Co. v. Sorrells*, 957 F.2d 509, 514, n. 7 (7th Cir. 1992)(citing *AT & T Technologies*, 475 U.S. at 649); *contra FSC Securities Corp. v. Freel*, 14 F.3d 1310, 1312 (8th Cir. 1994). Because the parties did not clearly agree to submit the arbitrability question to arbitration, that issue was appropriately subject to independent judicial review. *See Kaplan*, 115 S. Ct. at 1925-26. Accordingly, the district was the proper forum to assess the timeliness of the Cromwells' arbitration demand under Section 15.

In essence, the Cromwells argue that a genuine issue of material fact exists as to their failure to timely file their Statement of Claims with the NASD. On appeal,

they divide their claims into two groups: those regarding the five Coffey-managed limited partnerships in which they had a stake and those pertaining to the "unsuitability" of their investments. They argue that Coffey's status as the general partner in the limited partnerships renders their claims timely regarding those investments, because Coffey exercised continuing control over them. They assert that Coffey's actions as general partner are actions about which they are entitled to complain. While that may be true, the Cromwells have changed their argument on appeal. In their original arbitration demand, they focused upon Coffey's behavior in **recommending** the investments. Now, however, they seek to contest Coffey's behavior throughout his tenure as general partner. To properly assess the Cromwells' claims, this Court need only apply Section 15 to the unsuitability and concealment allegations stated in the Cromwell's original arbitration demand.

Accordingly, we must determine the meaning of "occurrence or event giving rise to the act or dispute, claim or controversy" in the context of the Cromwells' original claims. As part of their effort to recast those claims, the Cromwells now assert that the relevant "occurrence or event" was Coffey's repeated act of causing them to make additional note payments. However, the record reveals that the Cromwells actually challenged Coffey's investment recommendations only, their present claims notwithstanding. The district court was correct in observing:

> The only event or occurrence which could give rise to arbitration and which also falls within the six-year eligibility requirement is the fact that on November 12, 1987, the

> Cromwells signed a note in favor of Cusick Partnership. All subsequent contacts between Coffey and the Cromwells related to payments on their previous investment decisions.

During the applicable six-year period, the Cromwells made no new investment decisions, save one; their other expenditures were merely payments on previous investment decisions.

With regard to their unsuitability claims, the Cromwells argue that because the claims arising out of their last investment, the Cusick Partnership, were timely filed, all of their claims should be deemed timely filed. *Nesbit v. McNeil*, 896 F.2d 380, 384-85 (9th Cir. 1990)(holding, in the context of a churning case, that the statute of limitations did not begin to run until the final account transaction occurred, given the "unified" nature of the churning offense). This is not a churning case, however. *See Craighead v. E.F. Hutton & Co., Inc.*, 899 F.2d 485, 494 (6th Cir. 1990)(recognizing that churning and unsuitability claims are distinct); *see also Sorrells*, 957 F.2d at 510 n.2 (recognizing that the fact that a claimant has some timely filed claims does not render timely all of that claimant's potential claims). In the alternative, the Cromwell's urge us to adopt a "date of discovery" rule.

In their original Statement of Claim and Demand for Arbitration, the Cromwells also claimed that Coffey fraudulently concealed the unsuitability of the investments from them. As we determined in *Dean Witter Reynolds, Inc. v. McCoy*, 995 F.2d 649, 651 (6th Cir. 1993), if there is adequate proof of fraudulent concealment, the defendants' claims more than six-years-old may still be

pursued in arbitration. However, the district court observed that the Cromwells failed to present any evidence "of the kind of fraud or fraudulent concealment which would take this case outside the six-year bar." A review of the record indicates that this observation was correct.

B. Venue in the Eastern District of Tennessee

The Cromwells also claim that venue in the Eastern District of Tennessee was improper. The parties agree that venue is appropriate in "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred." 28 U.S.C. §§ 1391(a)(2) and (b)(2). According to the Cromwells, however, the relevant **event** was the filing of the Cromwell's Statement of Claim and Demand for Arbitration, which was mailed from Arizona to New York. Coffey contends that the relevant **events** are the facts underlying the Cromwells' investment decisions. As Coffey points out, the parties were first introduced in Knoxville, where they both resided at the time. In addition, all of investments were effected through the services of Tennessee corporations, with principal places of business in Knoxville. Moreover, any fraudulent concealment would have occurred in Knoxville. Thus, the district court was correct in determining that venue was proper in the Eastern District of Tennessee.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

C.A. No. 3:93-CV-507

SECURITIES SERVICE NETWORK, INC., STEVEN L. COFFEY, and ASSET PLANNING CORPORATION,
Plaintiffs,

v.

RONALD E. CROMWELL and VICTORINE CROMWELL,
Defendants.

ORDER

[Filed May 17, 1994]

This is an action to enjoin an arbitration proceeding filed by Ronald E. and Victorine L. Cromwell with the National Association of Securities Dealers, Inc. (NASD) on July 1, 1993. The remaining plaintiffs, Securities Service Network, Inc. and Steven L. Coffey, would have this Court issue a declaratory judgment that the controversy which the Cromwells are seeking to arbitrate is barred by the NASD regulations. The case is now before the Court on cross-motions for summary judgment.

The plaintiffs contend that the arbitration should be enjoined because none of the Cromwell's claims are eligible for arbitration pursuant to the six-year eligibility requirement set forth in Section 15 of the NASD Code of Arbitration Procedure.[1] Mr. Coffey claims, by affidavit, that each of the investments on which the Cromwell's arbitration claims are based was made before or in April of 1987, more than six years before arbitration was instituted.

The six-year time-bar in Section 15 is an eligibility requirement that "serves as an absolute bar to claims submitted for arbitration more than six years after the event which gave rise to the dispute." *Paine Webber, Inc. v. Farnam*, 870 F.2d 1286, 1292 (7th Cir. 1989). *See also Dean Witter Reynolds, Inc. v. McCoy*, 995 F.2d 649 (6th Cir. 1993)(interpreting the word "eligible" in Section 15 as absolutely barring stale claims).

According to the plaintiffs, the triggering occurrence or event for the running of the six-year period in Section 15 is the date of *purchase* of the relevant security. They point out that the Cromwells purchased each of the investments at issue between September of 1981 and April of 1987, and did not attempt to take their claims to arbitration until July of 1993. They also contend that installment payments made pursuant to promissory notes executed at the time the Cromwells made certain of the investments do not remove the time bar. Because

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[1]Section 15 provides,

No dispute, claim or controversy shall be eligible for submission to arbitration under this code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim or controversy.

payments made pursuant to promissory notes require no new investment decisions, they are not considered "investments" for purposes of the six-year bar imposed by Section 15. *See Pommer v. Medtest Corp.*, 961 F.2d 620, 625-26 (7th Cir. 1992).

The Cromwells contend that the defendants drew them into unsuitable investments from which they could not withdraw. Many of these investment were limited partnerships in which defendant Coffey, as the general partner, could control the cash flow to the limited partners and, with it, the obligation of the partners (such as the Cromwells) to make further contributions. The Cromwells contend that their dispute with the plaintiffs is arbitrable if it (1) relates to their account and (2) arises out of an occurrence or event that happened within the six years preceding the filing of their arbitration demand in July of 1993. While they tacitly concede that all but one of the initial investment decisions were made outside the limitations period, they take the position that representations Mr. Coffey made within the six years preceding their arbitration demand were "occurrences" giving rise to an arbitrable controversy. They contend that the NASD does not draw arbitrary distinctions based upon the date of the initial investment but rather looks to whether a claim "falls wholly outside the six year period." *Paine Webber, Inc., supra*, at 1292.

The Court has examined the letters from Mr. Coffey and the other documents attached to the Cromwells' affidavit. The only event or occurrence which could give rise to arbitration and which also falls within the six-year eligibility requirement is the fact that on November 12, 1987, the Cromwells signed a note in favor of the Cusick Partnership. All subsequent contacts

between Mr. Coffey and the Cromwells related to payments on their previous investment decisions. Nothing in the other documents shows evidence of the kind of fraud or fraudulent concealment which would take this case outside the six-year bar.

The Court is satisfied that all of the Cromwells' claims are time-barred under the NASD rules with the possible exception of the decision to sign the Cusick Partnership note. Mr. Coffey states, by affidavit of March 1, 1994, that the last investment the Cromwells made was in April of 1987. The Cromwells do not exactly refute this. In their affidavit of April 2, 1994, they name the five limited partnerships in which they invested in reliance on Mr. Coffey's advice; they name the Cusick Partnership as one of these; and then they state, "A copy of our note to the Cusick Partnership dated November 12, 1987, is attached as Exhibit A to this affidavit." The note is indeed so attached. The Cromwells do not explain why the note was signed in November if the investment decision was actually made in April as the plaintiffs allege. The Cromwell's brief contains similarly careful wording. In the "facts" section, it says,

> On November 12, 1987, the Cromwells executed a note in the amount of $38,281.00 payable to the Cusick Partnership in ten annual installments. This note represented the Cromwells' investment in the Cusick Partnership, a Tennessee limited partnership whose general partner was Coffey.

Later, the brief says,

> The documents attached to the Cromwells' affidavit shows an assumption of a new obligation regarding the Cusick Partnership in November of 1987 when they signed a note for $38,281.

Working with the skimpy information available to it, the Court infers that the original decision to invest in the Cusick Partnership was made more than six years before the case was submitted to arbitration. However, the apparent assumption of a new obligation to the Cusick Partnership is an event occurring within the six year eligibility requirement which brings that partnership into the range of issues eligible for arbitration under the NASD Rules.

Accordingly, the plaintiffs' requested declaratory and injunctive relief is hereby **GRANTED in PART.** The Court **FINDS** all of the Cromwells' claims ineligible for arbitration except those related to the Cusick Partnership; the Cromwells are **ENJOINED** from attempting to arbitrate any of their claims except those related to the Cusick Partnership; and this action is **DISMISSED**.

ENTER:

THOMAS G. HULL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

C.A. No. 3:93-CV-507

SECURITIES SERVICE NETWORK, INC., STEVEN L. COFFEY, and ASSET PLANNING CORPORATION,
Plaintiffs,

v.

RONALD E. CROMWELL and VICTORINE CROMWELL,
Defendants.

ORDER

[Filed November 15, 1993]

Plaintiffs, Securities Service Network, Inc., Steven L. Coffey and Asset Planning Corporation bring this action to enjoin an arbitration proceeding filed by Ronald E. and Victorine L. Cromwell before the National Association of Securities Dealers (NASD), Inc. They would also have this Court issue a declaratory judgment that the controversy which the Cromwells are seeking to litigate in the arbitration procedure is barred by NASD regulations and relevant statutes of limitations. The case

is now before the Court on the Cromwells' motion to dismiss. [Doc. 7].

The Cromwells first contend that this Court lacks subject matter jurisdiction. They point out that the original complaint was predicated on federal question jurisdiction (because the Cromwells' arbitration action alleges a civil RICO violation) but that the only question before this Court is one of contract law. Anticipating that the plaintiffs might simply amend their complaint to invoke this Court's diversity jurisdiction, the Cromwells argue, in the alternative, that venue is not proper in this district. They contend that this action should have been brought in Arizona, where they reside and where the arbitration has been sought.

The plaintiffs have, indeed, amended their original pleadings to invoke diversity jurisdiction. Plaintiff Coffey is a citizen and resident of Knoxville, Tennessee. Securities Service Network, Inc. and Asset Planning Corporation are both Tennessee corporations with their principal places of business in Knoxville, Tennessee. The Cromwells are residents and citizens of Phoenix, Arizona, and the amount in controversy exceeds this Court's jurisdictional minimum. They now contend that this Court has jurisdiction both because of the diversity of citizenship of the parties and because the underlying RICO claim involves a federal question.

DOES THIS COURT HAVE JURISDICTION OVER THIS CAUSE?

The Cromwells are correct that, in considering whether or not this Court has jurisdiction, the Court must not look to the underlying RICO issue submitted for

arbitration but to questions presented to this Court for resolution. The questions here involve both a state law contract question - *i.e.*, whether or not, pursuant to NASD regulations, the arbitration is time-barred and a federal question involving the statute of limitations for a RICO claim. It would appear, therefore, that this Court has jurisdiction on both grounds.

IS VENUE APPROPRIATE IN THIS DISTRICT?

Certainly the underlying RICO claim could have been brought in this Court. According to the plaintiffs, all of the investments at issue in the underlying lawsuit were effected through the services of Asset Planning Corporation or Southern Financial Consultants, Inc. in Knoxville, Tennessee. However, the arbitration demand was made in Arizona, by Arizona residents. And, while the Tennessee parties have a right to have a federal court determine the arbitrability of the Cromwell's claim, *see Dean Witter Reynolds, Inc. v. McCoy*, 995 F.2d 649 (6th Cir. 1993), it is by no means clear that they have a right to such determination in this Court. However, in this case, the Cromwells' claims will clearly be barred from arbitration unless they succeed in showing fraudulent concealment. And, under the teachings of *Dean Witter Reynolds, supra*, the district court which determines the arbitrability question must also consider the fraudulent concealment question prior to arbitration. The fraudulent concealment, if it happened at all, would have happened in this district. Accordingly, litigation of this question here, rather than in Arizona, does not seem inappropriate.

Accordingly, the Cromwells' motion to dismiss is hereby **DENIED**. This Court will endeavor to determine

the issue of eligibility for arbitration and the fraudulent concealment question.

In light of the foregoing, the parties are hereby **ENJOINED** from proceeding with their arbitration action before the National Association of Securities Dealers, Inc., pending a determination of the issues before this Court.

Plaintiffs are hereby **ORDERED** to execute and file a security bond in favor of the Cromwells to cover any costs and damages that they may incur if the Court should ultimately find that they were wrongfully enjoined or restrained from proceeding with their arbitration. If the parties cannot agree on the amount of the bond, each should offer the Court some evidence upon which a bond amount could be established.

ENTER:

THOMAS G. HULL
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
NOV 29
CLERK

No. 95-697

In The

Supreme Court of the United States

October Term, 1995

RONALD E. CROMWELL and
VICTORINE L. CROMWELL,

Petitioners,

v.

SECURITIES SERVICE NETWORK, INC.,
STEVEN L. COFFEY and ASSET
PLANNING CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF OF RESPONDENT SECURITIES SERVICE NETWORK, INC., IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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15 pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether the parties' agreement to arbitrate disputes pursuant to the Code of Arbitration Procedure of the National Association of Securities Dealers, Inc., evinces a "clear and unmistakable" expression of intent to have the issue of arbitrability decided by the arbitrators rather than the courts?

II. Whether venue was proper in the United States District Court for the Eastern District of Tennessee?

PARTIES

Petitioners, Ronald E. Cromwell and Victorine Cromwell, are individuals.

Respondent Securities Service Network, Inc., is a corporation duly organized and existing under the laws of the State of Tennessee. Securities Service Network, Inc., has no parent company or subsidiaries.

Respondent Steven L. Coffey, an individual, died on July 13, 1995, and a Suggestion Of Death has been filed in this cause.[1]

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[1] Petitioners name Asset Planning Services, Inc. ("Asset Planning"), as a Respondent in this matter; however, summary judgment was awarded in favor of Asset Planning by the United States District Court for the Eastern District of Tennessee, which award was not made a subject of the Petitioners' appeal to the United States Court of Appeals for the Sixth Circuit.

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BRIEF OF RESPONDENT SECURITIES SERVICE NETWORK, INC., IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Respondent Securities Service Network, Inc. ("Respondent"),[2] respectfully requests that this Court deny the Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit submitted by the Petitioners, Ronald E. Cromwell and Victorine L. Cromwell.

STATUTES INVOLVED

28 U.S.C. § 1391 provides in pertinent part as follows:

> (a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which the defendants are subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.

[2] Petitioners refer to Respondent Securities Service Network, Inc., as "Security Services Network".

STATEMENT OF THE CASE

In July 1993, Petitioners filed a Statement Of Claim with the Director of Arbitration of the National Association of Securities Dealers, Inc. ("NASD"), against Respondents. In their Statement Of Claim, Petitioners sought damages for alleged violations of a variety of state and federal laws arising out of their purchase of twenty-two allegedly unsuitable and speculative investments. Petitioners purchased twenty-one of the twenty-two investments at issue more than six years prior to the filing of the Statement Of Claim. Pet., App. 2a-3a.[3]

In response, Respondents filed a complaint in the United States District Court for the Eastern District of Tennessee seeking to enjoin the NASD arbitration proceeding and further seeking a declaratory judgment that Petitioners' claims were not eligible for arbitration before the NASD on the grounds that Petitioners' claims were barred by application of the six year time-bar of Section 15 of the NASD's Code of Arbitration Procedure.[4]

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[3] In addition, Petitioner Victorine L. Cromwell, who became a licensed and registered securities representative in 1983, served as Petitioners' account representative and effected for Petitioners' own account fourteen of the twenty-two investments that were the subject of Petitioners' Statement Of Claim. Pet., App. 2a-3a.

[4] Section 15 of the NASD's Code of Arbitration Procedure provides as follows:

> No dispute, claim, or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim, or controversy. This section shall not extend applicable statutes of limitations, nor shall it apply to any case

Petitioners moved to dismiss Respondents' complaint for lack of subject matter jurisdiction and improper venue. Respondents amended their complaint to assert diversity jurisdiction. Thereafter, the district court determined that venue was appropriate and, accordingly, denied Petitioners' motion to dismiss. Pet., App. 17a-18a. Petitioners then answered the complaint and moved to compel arbitration. Both parties moved for summary judgment.

Applying established Sixth Circuit precedent, the district court partially granted Respondents' motion for summary judgment, holding that Petitioners' claims (save for claims relating to the one investment that had been purchased within the six-year period preceding the filing of the Statement Of Claim) were, pursuant to Section 15 of the NASD Code of Arbitration Procedure, ineligible for submission to arbitration. Pet., App. 13a. Accordingly, the district court enjoined Petitioners from arbitrating any of their claims except those related to the one investment. Pet., App. 14a.

Petitioners filed a timely appeal to the United States Court of Appeals for the Sixth Circuit. After the parties submitted their briefs to the court of appeals, but before oral argument, this Court rendered its opinion in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. ___, 115 S. Ct. 1920, 131 L.Ed.2d 985 (1995), wherein the Court restated the standard to be applied in determining whether the

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which is directed to arbitration by a court of competent jurisdiction.

parties agreed to arbitrate the issue of arbitrability as follows:

> When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that govern the formation of contracts
>
> * * *
>
> [; provided, however,] when courts decide whether a party has agreed that arbitrators should decide arbitrability: Courts should not assume that the parties agreed to arbitrate arbitrability unless there is "clea[r] and unmistakabl[e]" evidence that they did so.

First Options, 131 L.Ed.2d at 993-94 (quoting *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 106 S. Ct. 1415, 89 L.Ed.2d 648 (1986)).

Relying on *First Options*, Petitioners argued for the first time at oral argument before the Sixth Circuit that Section 35 of the NASD Code of Arbitration Procedure constituted a "clear and unmistakable" expression of the parties' intent to have the arbitrators determine the issue of arbitrability.[5] The Sixth Circuit disagreed, however, on the basis that Section 35 alone does not "constitute[ ] the

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[5] Section 35 of the NASD Code of Arbitration Procedure states:

> The arbitrators shall be empowered to interpret and determine the applicability of all provisions under this Code and to take appropriate action to obtain compliance with any ruling by the arbitrator(s). Such interpretations and actions to obtain compliance shall be final and binding upon the parties.

requisite 'clear and unmistakable evidence' that the parties intended and agreed to arbitrate the issue of arbitrability." Pet., App. 6a. Accordingly, the Sixth Circuit held that the district court was the proper forum to address the issue of the timeliness (i.e., arbitrability) of Petitioners' arbitration demand. *Id.* The Sixth Circuit then reviewed and affirmed the district court's determination that venue was appropriate in the Eastern District of Tennessee and the district court's grant of partial summary judgment in favor of Respondents. Pet., App. 6a-9a.

REASONS WHY THE PETITION SHOULD BE DENIED

Primarily at issue before the Court is the question of whether Section 35 of the NASD Code of Arbitration Procedure, standing alone, is sufficiently "clear and unmistakable" evidence of contractual intent to overcome the presumption that courts (as opposed to arbitrators) generally have the primary authority to determine arbitrability. Pet., 6. Petitioners have also stated a sub-issue regarding venue in actions brought to enjoin arbitration proceedings where the demand for arbitration has been untimely made. Pet., 7.

While there exists a conflict among the Circuits on the issue of whether Section 35 provides the necessary "clear and unmistakable" evidence of intent to overcome the presumption that courts decide arbitrability,[6] this case

[6] In addition to the determination of the Sixth Circuit below, *compare Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cohen*, 62 F.3d 381, 384 (11th Cir. 1995) (concluding that, "at

nevertheless does not merit review by this Court for three reasons.[7] First, this Court does not ordinarily sit to resolve issues regarding the interpretation of private contracts. Second, any decision rendered by this Court may well not have the far-reaching impact on the securities industry claimed by Petitioners inasmuch as broker/

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most, Section 35 creates an ambiguity as to who determines arbitrability" which ambiguity "is insufficient to override the presumption that courts determine arbitrability"), *and Edward D. Jones & Co. v. Sorrells*, 957 F.2d 509, 514 n.6 (7th Cir. 1992) (determining that Section 35 is not a clear and unmistakable expression of intent to have the arbitrators determine arbitrability) *with FSC Securities Corp. v. Freel*, 14 F.3d 1310, 1313 (8th Cir. 1994) ("by adopting the NASD Code of Arbitration Procedure . . . appellants agreed to give the arbitrators discretion via section 35 . . . to interpret section 15's time limitation").

[7] Pursuant to Supreme Court Rule 10:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

dealers could unilaterally change their customer agreements to specifically exclude the issue of arbitrability from arbitration or Self Regulatory Organizations such as the NASD could amend their arbitration rules to provide a clear statement as to who decides arbitrability. Finally, Petitioners' claims regarding venue likewise do not merit review by this Court because Petitioners have neither stated a valid basis for jurisdiction nor shown that the fact-specific venue issue is important to anyone other than the litigants to this action.

I. Petitioners Present No Important Issue Of Federal Law That Merits Expenditure Of This Court's Limited Time And Resources.

A. This Court does not ordinarily sit to review the interpretation of private contracts.

"[T]he interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review." *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*, 489 U.S. 468, 474, 109 S. Ct. 1248, 103 L.Ed.2d 488 (1989). As acknowledged by Petitioners, the arbitrability issue does not present a

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(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

significant or important legal question but rather is simply a matter of contract interpretation. Pet., 6-7; *see also First Options*, 131 L.Ed.2d at 993; *AT&T Technologies*, 475 U.S. at 649. In reaching conflicting decisions, the courts of appeals, including the Sixth Circuit below, that have considered the arbitrability issue in light of Section 35 of the NASD Code of Arbitration Procedure have, as directed by this Court, applied contract interpretation principles. *See* note 6 *supra*. Thus, the circuits have not disagreed on the applicable standard to apply but only as to the result. Inasmuch as this Court does not ordinarily sit to review the interpretation of private contracts, a review of the Sixth Circuit's opinion is not warranted.

B. Any decision rendered by this Court may not have a far-reaching impact.

Because the question faced by the courts is simply one of contract interpretation and because the "clear and unmistakable" statement of the parties' intent can be provided by (i) clarifying changes or amendments to the parties' agreements or (ii) by the arbitration sponsor providing the requisite degree of clarity by amending its rules, any decision that this Court might render would have little precedential effect or practical value. Accordingly, review does not warrant the expenditure of this Court's limited time and resources.

II. Petitioners' Alleged Grounds For Review Of The Venue Issue Do Not Satisfy The Jurisdictional Requirements For Review By This Court Nor Will Consideration Of The Issue Serve An Important Purpose For Anyone Other Than The Parties To This Litigation.

This Court will rarely grant a petition for writ of certiorari "when the asserted error consists of erroneous factual findings." Supreme Court Rule 10. Petitioners do not specifically argue why this Court should grant certiorari on the venue issue except to claim that an "uncertainty [exists] over where venue is proper in actions brought to stay arbitration." This claimed uncertainty does not satisfy the jurisdictional elements ordinarily necessary to support the issuance of a writ of certiorari by this Court. *See* Supreme Court Rule 10, *supra* note 7.

Moreover, this Court's review of the venue issue will serve no important purpose for anyone other than the parties to this litigation. Indeed, to determine whether venue exists in a certain district on the grounds that a "substantial part of the events or omissions giving rise to the claim occurred" in that district necessarily requires an examination of facts peculiar to each individual case. The Sixth Circuit affirmed the district court's determination that venue in the instant case was appropriate in the Eastern District of Tennessee based on the facts that the parties were first introduced in that district at a time when they both resided there, that all of the investments at issue were effected through Tennessee corporations whose principal places of business were in that district and that the alleged fraudulent concealment by Respondents occurred, if at all, in that district. Pet., App. 9a.

Accordingly, in the absence of jurisdictional requirements for review or an otherwise important purpose, review of the venue issue by this Court is not warranted.

CONCLUSION

For the foregoing reasons, the Petition For A Writ Of Certiorari should be denied.

Respectfully submitted,

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